NO. 20358

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLYING TIGER LINES, INC., and
EMPLOYERS LIABILITY INSURANCE COMPANY,

Appellants,

v.

DAVID R. LANDY, Deputy Commissioner,
United States Department of Labor, and
PETER GREGORY THOMAS, MAUREEN ALTAIR
THOMAS, and TERRY AVA THOMAS, minor
children of Gregory Peter Thomas,
deceased,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE DEPUTY COMMISSIONER

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I N D E X

CITATIONS

Cases:

Cases--Continued

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Statutes--Continued

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JURISDICTIONAL STATEMENT

This compensation appeal action was brought pursuant to Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 921(b), by appellants, the employer and its compensation insurance carrier, in the United States District Court for the Northern District of California against appellees, the deputy commissioner and surviving dependents of the employee

Gregory Peter Thomas. Appellants sought to set aside the deputy commissioner's compensation award of death benefits to the claimants who are joined as appellees herein. The district court granted the deputy commissioner's motion for a summary judgment, affirmed his award and dismissed the appellants' action. Judgment was entered May 24, 1965, and appellants filed notice of appeal on July 16, 1965; jurisdiction of this court rests on 28 U.S.C. 1291.[1/]

STATEMENT OF THE CASE

The ultimate question to be resolved on this appeal is whether the district court correctly approved the deputy commissioner's award of benefits under the workmen's compensation provisions of the Defense Base Act, 42 U.S.C. 1651 et seq., incorporating the Longshoremen's Act, 33 U.S.C. 901 et seq., to the surviving dependents of a member of the crew of a Constellation aircraft operated by Flying Tiger Lines who was lost over the high seas, when his aircraft disappeared while proceeding from Travis Air Force Base, California, to Tan Son Nhut Air Base, Saigon, South Vietnam, in the performance of his employer's national defense public work service contract for

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1/ A serious question exists as to jurisdiction of the appeal. The Notice of Appeal (R. 53, Appellants' App. 34) appeals from the Order Granting Motion for Summary Judgment, a non-appealable order. The notice refers, however, to the date of entry of judgment, May 24, 1965.

transporting military personnel. The underlying facts may be simply stated and are not in dispute.

The facts.--Flying Tiger Lines, Inc., entered into a contract with the United States Air Force, Contract No. AF-11(626)-389 and Service Order No. 29 S.O.M. thereunder, dated March 2, 1962. Pursuant to that contract Flying Tiger was required to carry certain military personnel from Travis Air Force Base to Saigon via Clark Air Force Base, Manila, P. I. Gregory Peter Thomas, the employee to whose survivors the death benefits were awarded by the Deputy Commissioner in the present case, was pilot on the flight.

The plane refueled at Agana, Guam, and proceeded on course toward Clark Air Force Base, Manila. At 1:30 A.M. on March 16, 1962, a merchant ship en route to Honolulu reported sighting vapor trails and a bright flash in the sky. The reported flash occurred at a point on the anticipated course of the aircraft at a time when the plane should have been there. The ship diverted its course and spent seven hours searching; extensive search was continued by the Air Force and Naval services until March 23, 1962. No evidence of plane debris or survivors was discovered.

The military authorities concluded and certified that the plane had crashed in the sea with the loss of all members of the

crew and military passengers.[2/] An order of the Superior Court of Los Angeles County, California, was accordingly entered on September 28, 1962, establishing the fact of death on March 16, 1962. The California Department of Public Health issued thereon a "Court Order Delayed Certificate of Death" for Gregory Peter Thomas, the employee.

The state proceedings.--The widow and children of the deceased employee filed a claim for death benefits under the California Workmen's Compensation Act and on March 18, 1963, and the referee of the Industrial Accident Commission of California entered an order as follows (Tr. 208-210):

> Application having been filed herein; all parties having appeared and the matter having been regularly submitted, the Honorable LEON H. BERGER, Referee, finds, awards and orders as follows:
>
> FINDINGS OF FACT
>
> 1. Gregory Peter Thomas, died on March 16, 1962 as a proximate result of injury on the same day arising out of and occurring in the course of his employment by the Flying Tiger Line, Inc., whose insurance carrier was Employers Mutual Liability Insurance Company of Wisconsin.
>
> 2. Employee left surviving him, wholly dependent, Peter Gregory Thomas, Maureen Altair Thomas and Terry Thomas, wholly dependent minor children.
>
> 3. No burial expense was incurred by the applicants.

2/ Litigation involving the rights of dependents of the military passengers to recover damages from Flying Tiger has already been before this Court. Warren v. Flying Tiger Line, 9th Cir. No. 19,572

4. Doreen M. Thomas is neither a necessary nor proper party applicant herein.

5. The reasonable value of the services of applicant's attorney is $750.00.

A W A R D

AWARD IS MADE IN favor of Peter Gregory Thomas, Maureen Altair Thomas and Terry Thomas, minors against Employers Mutual Liability Insurance Company of Wisconsin, of $17,500, payable as follows:

To Doreen M. Thomas as Guardian ad Litem and trustee for Peter Gregory Thomas, Maureen Altair Thomas and Terry Thomas, minors, $3,710.00 payable forthwith and $70.00 weekly thereafter beginning March 24, 1963, until paid, together with interest provided by law; less $750.00 payable to J. Wallace McKnight, whose lien is hereby allowed.

After weekly instalments totalling $4,270.00 had been made the Industrial Accident Commission issued an order approving a request for lump sum payment commuting the remaining unpaid balance of $13,230.00 to a then present value of $12,549.91, with the result that the total payments made by the appellants amounted to $16,819.91.

The deputy commissioner's proceedings.--The employee's survivors also filed a claim under the Defense Base Act, incorporating Longshoremen's Act, 33 U.S.C. 930(a), and a hearing was held on that claim on July 7, 1964.

At the hearing before the deputy commissioner, the appellants controverted the claim on the ground that it "does not come under the purview of the Defense Bases Acts" because "this employment was not in relation to a defense base and was not under a public

works contract within the meaning of the law and that there was also the election of remedies under the state act" (Tr. 8-9). They further contended that in the event of a federal award the employer and insurance carrier were entitled to credit for the full amount of $17,500 because "under the state law, paying a lesser sum by commuted value, we had gained legally full payment" (Tr. 10-11).

The deputy commissioner received in evidence the contract documents pursuant to which the public services were being rendered by Flying Tiger to the Air Force at the time of the fatal accident. These include the Call Contract, No. AF-11(226) 389, effective October 1, 1961, between the Air Force and Flying Tiger (Tr. 29, Ex. J, 59-206), and the Service Order, No. 29, calling for transportation of 99 persons from Travis to Saigon (Tr. 30-31, Ex. K, 207). These instruments clearly show that t "services to be furnished" by the contractor were "air transportation services" (Tr. 71) and throughout the contract the specifications described in detail the "requirements for performance of services" (Tr. 73 et seq.).

No contention was made before the deputy commissioner, in the opening statement or later, nor was any evidence offered as to the employee's exclusion from Defense Base Act coverage on the ground that as pilot of a Constellation aircraft he was "a master or member of a crew of any vessel" within the meaning of 42 U.S.C. 1654 and 33 U.S.C. 903(a)(1). It was stated that in the case of two of the eleven crew members who were lost, the

employer and insurer were making voluntary payments under the Defense Base Act "under a contract with the union requiring such payments" (Tr. 43). Although invited by the deputy commissioner to offer further evidence, the employer and carrier, after reflection, offered nothing more (Tr. 45).

The deputy commissioner issued his compensation order on August 7, 1964, as follows:

> In the matter of a claim for death benefits filed under the Acts of Congress of August 16, 1941 and December 2, 1942 (42 USCA 1651-1654) for an injury occurring in the course of an employment for the United States outside the Continental United States in the Pacific Compensation District, and said claim having been transferred to the undersigned Deputy Commissioner of the 13th Compensation District by the Deputy Commissioner of the Pacific Compensation District, with the approval of the Bureau of Employees' Compensation, and such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:
>
> FINDINGS OF FACT
>
> 1. That on the 15th day of March, 1962, the deceased employee above named was in the employ of the employer above named as an Airline Pilot on a Public Works Contract number A.F. 11 (626)-389 to transport Army personnel outside the Continental United States in the Pacific Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by the Acts of Congress of August 16, 1941 and December 2, 1942 (42 U.S.C.A. 1651-1654) and that the liability of the employer for compensation under said Acts was insured by the Employers Mutual Liability Insurance Company of Wisconsin;
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> 2. That on said day the employee was assigned by the employer as a Pilot on a Constellation Aircraft number 69213, under an Air Force Service Order number 29, dated March 2, 1962, to carry Army personnel from Travis Air Force Base, California, to

Tan Son Nhut Air Base, Saigon, Viet Nam via Clark Air Base, Manila, Philippine Islands; that the aircraft had refueled at Agana, Guam and was apparently proceeding on course to Clark Air Force Base, Manila;

3. That at 1.30 A.M., March 16, 1962 a merchant vessel enroute to Honolulu reported sighting vapor trails and a bright flash in the sky approximately seventeen miles northeast of its position; that the location of the reported flash was on the anticipated course of the aircraft and, if the plane had continued its plotted course and speed, it was where the aircraft should have been at that time; that an intensive air and sea search failed to find any evidence of the plane, debris or survivors; that the military authorities concluded that for an unknown reason the plane crashed into the ocean and all members of the crew and military passengers perished; that the death of the employee arose out of and in the course of the employment;

4. That written notice of death was not given to the employer within thirty days, but that the employer had knowledge of the death and has not been prejudiced by the lack of such written notice;

5. That the average weekly wages of the employer herein at the time of his death amounted to $425.93;

6. That Peter Gregory Thomas, born on July 6, 1950, Maureen Altair Thomas, born on March 1, 1952, and Terry Ava Thomas, born on July 15, 1953, are the surviving minor children of the employee, and they are entitled to death benefits at the rate of $68.25 per week (65 per cent of $105.00, 35 per cent for one child increased by 15 per cent for each child in excess of one) payable in equal shares;

7. That death benefits payable to all beneficiaries shall be subject to the limitations of the Act, with respect to the maximum weekly rate, continuing dependency and age;

8. That death benefits due in behalf of the surviving minor children of the employee shall be payable to Mrs. James Unger (formerly known as Mrs. Doreen M. Thomas) their mother and legal guardian;

9. That accrued death benefits due and payable in behalf of the three minor children from March 16,

1962 to July 7, 1964, inclusive, (date of the last hearing) 120-5/7 weeks at the combined rate of $68.25 per week amount to $8238.75;

10. That the employer and insurance carrier have paid $16,819.91 in error under an award by the Industrial Accident Commission of the State of California in behalf of the three minor children as death benefits and they are entitled to a credit for such payment.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following:

AWARD

That the employer, Flying Tiger Lines, Incorporated and the insurance carrier, Employers Mutual Liability Insurance Company of Wisconsin, shall pay death benefits as follows:

To Mrs. James Unger (formerly known as Mrs. Doreen M. Thomas) in behalf of Peter Gregory Thomas, Maureen Altair Thomas, and Terry Ava Thomas, 120-5/7 weeks at the combined rate of $68.25 per week from March 16, 1962 to July 7, 1964 inclusive, (date of the last hearing) amounting to $8238.75. The employer and insurance carrier having paid the sum of $16,819.91, which amount is $8581.16 in excess of the death benefits accrued to July 7, 1964 inclusive, shall be given credit for such payment as it may extend into the future and thereafter shall continue payments of death benefits at the combined rate of $68.25 per week in biweekly installments, subject to the limitations of the Act in respect to age and continuing dependency.

The district court proceedings.--As already noted, appellants instituted the present action to set aside the deputy commissioner's award. Appellants' complaint alleges that "no express issue of jurisdiction was raised in the proceedings before the California Industrial Accident Commission but it will be conceded that the power to make an award of benefits was lacking unless the Commission possessed the necessary jurisdiction to

take such action (Para. XIII, R. 03-04). The complaint does not allege, either in reciting the contentions raised at the hearing before the deputy commissioner (Para. XVIII, R. 05) or in specifying the errors committed by the deputy commissioner (Para. XXII, R. 06), that decedent's fatal injury was excluded from Defense Base Act coverage because the pilot of the Constellation aircraft was a master or member of the crew "of any vessel." This issue was first raised by appellants in briefing and argument before the District Court (R. 37-40).

The district court's opinion, affirming the deputy commissioner's award, is reproduced in the record (R. 46-51) and appears in appellants' appendix (pp. 26-33). The court below found that in the light of the legislative history and previous case interpretation of the Act, the service contract here in question was for a "public work" and was therefore subject to the Defense Base Act (App. 30), and that the deceased employee, as pilot of the Constellation, was not "a master or member of a crew of any vessel" within 42 U.S.C. 1654 and 33 U.S.C. 903(a)(1). That exception, the court held[3/], refers only to seamen within the protection of the Merchant Marine (Jones) Act, 46 U.S.C. 688 (App. 31).

The court below further found that although the state award was res judicata between the parties under state law, the Defense

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3/ Citing Warner v. Goltra, 293 U.S. 155, 159-160 (1934) and South Chicago Co. v. Bassett, 309 U.S. 251, 256 (1939).

Base Act remedy is exclusive and the state result is not res judicata against a federal award (App. 31-32). Finally it held that appellants were entitled to credit only for $16,819.91 actually received by the claimants and not for the $17,500.00 allowable under state law (App. 32-33). The district court accordingly affirmed the compensation order and dismissed appellants' complaint on the merits (R. 52). From this judgment the present appeal was taken (R. 53).

STATUTE INVOLVED

The pertinent sections of the Defense Base Act, as amended, 42 U.S.C. 1651 et seq., provide:

42 U.S.C. 1651:

> (a) Except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, shall apply in respect to the injury or death of any employee engaged in any employment--
>
> * * * *
>
> (4) under a contract entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1)-(3) of this subdivision, for the purpose of engaging in public work, and every such contract shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) (1) shall, before commencing performance of such contract, provide for securing to or on behalf of employees engaged in such

public work under such contract the payment of compensation and other benefits under the provisions of this chapter, and (2) shall maintain in full force and effect during the term of such contract, subcontract, or subordinate contract, or while employees are engaged in work performed thereunder, the said security for the payment of such compensation and benefits, but nothing in this paragraph shall be construed to apply to any employee of such contractor of subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.

(b) As used in this section--

(1) the term "public work" means any fixed improvement or any project, whether or not fixed, involving construction, alteration, removal or repair for the public use of the United States or its allies, including but not limited to projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project;

(2) * * *;

(3) the term "war activities" includes activities directly relating to military operations;

(4) the term continental United States means the States and the District of Columbia.

(c) The liability of an employer, contractor (or any subcontractor of subordinate subcontractor with respect to the contract of such contractor)

under this chapter shall be exclusive and in place of all other liability of such employer, contractor, subcontractor, or subordinate contractor to his employees (and their dependents) coming within the purview of this chapter, under the workmen's compensation law of any State, Territory, or other jurisdiction, irrespective of the place where the contract of hire of any such employee may have been made or entered into.

ARGUMENT

The ultimate issue in this case is whether the finding of the deputy commissioner--that the fatal injury to the employee was subject to the compensation provisions of the Defense Base Act--was supported by substantial evidence. The rule applicable to judicial review of compensation orders, as recently reiterated by the Supreme Court in O'Keeffe v. Smith Associates, 380 U.S. 359, 362 (1965), is that the findings of the deputy commissioner "are to be accepted unless they are irrational or 'unsupported by substantial evidence on the record * * * as a whole.'"[4/]

Appellants contend that the deputy commissioner's award of benefits to the employee's dependents in this case is contrary to law because the public works service contract here involved is not within the meaning of 42 U.S.C. 1651(b)(1) and because the employee as pilot of a Constellation aircraft was specifically excepted from coverage as "a master or member

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4/ Accord: O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951); Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469 (1947).

of the crew of any vessel" by 42 U.S.C. 1654 and 33 U.S.C. 903(a)(1). They further contend that the dependents are barred by the election of California state compensation.

We show in this brief that that deputy commissioner's award was in accord with the natural meaning of the statutory language, with the legislative intent and with the judicial precedents under the Act, and that it was fully supported by substantial evidence on the record as a whole; it was therefore in all respects in accordance with the law. We further show that the acceptance of compensation under the state award was not an election which waived or released claimants' federal rights, but merely entitled appellants to credit for the amounts received by the claimants.

I. Decedent's employment was within the coverage of the Defense Base Act.

1. The deceased aircraft pilot was employed in the performance of a public work contract within the meaning of the Act. Since its amendment in 1958 the public works covered by the Defense Base Act are defined in 42 U.S.C. 1651(b)(1) as follows:

> (1) The term "public work" means any fixed improvement or any project, whether or not fixed, involving construction, alteration, removal or repair for public use of the United States or its allies, including but not limited to projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project. [Emphasis added]

Until its amendment in 1958 the definition was less specific in its terms and read as follows:

> (b) As used in this section, the term "public work" means any fixed improvement or any project involving construction, alteration, removal, or repair for public use of the United States or its Allies, including but not limited to projects in connection with the war effort, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project.

Even under this more restricted language the federal courts had upheld an award of federal compensation under the Act even though concurrently the New York courts were upholding awards in similar situations under the New York state act.

In Republic Aviation Corp. v. Lowe, 69 F. Supp. 472, 476, 479 (SDNY 1946), aff'd 164 F. 2d 18 (2d Cir. 1947), cert. den. 333 U.S. 845, an award for the overseas death of the pilot of a defense base contractor's plane was upheld. There the contract was to furnish the Government with technical personnel including test pilots (p. 473). The pilot performing under the contract was killed in the crash of a plane he was testing. The employer and insurer contended, as in the present case, that the service contract was not for a "public work" and the employment thus not within the Defense Base Act. The court rejected the contention that by referring to contracts involving fixed improvement, construction, alteration, removal or repair, Congress had excluded work not fixed at a permanent location and thus the pilot's services were not "one of the species of work set forth in the statutory definition" (id. 475). The

court held the definition's reference to "projects in connection with the war effort" was "a very broad term and should be liberally construed in line with the public policy of protection for the employees" (p. 479).

The New York courts meanwhile upheld awards under the New York state compensation act in similar circumstances, employing the principle of the twilight zone of overlapping state and federal remedies. It is upon these cases which appellants now rely.5/ In 1958, however, Congress amended the definition of "public work" by Public Law No. 85-608, 72 Stat. 537, so as expressly to resolve any doubt concerning federal coverage which might have arisen from the application by the New York courts of the twilight zone principle in sustaining awards under state law.

The amendment inserted the words "whether or not fixed" following the phrase "in the project" and the clause "projects or operations under service contracts and projects in connection with the national defense or with was activities" was substituted for "projects in connection with the war effort."

5/ Walker v. American Overseas Airline, Inc., 275 App. Div. 974, 90 N.Y.S. 2d 547, 538 (1949), appellants' chief reliance, Br. 13, was a per curiam decision on the authority of Hammond v. Albany Garage Co., 237 App. Div. 647, 47 N.Y.S. 2d 897 (1944) a maritime twilight zone case discussing the evolution of Davis v. Department of Labor, 317 U.S. 249 (1942) out of the original rule of Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

An explanation for this change was given in S. Rep. No. 1886, 85 Cong., 2d Sess., 1958 U. S. Code Cong. & Adm. News, 3321, 3324, 3330. Summarizing the purpose of the amendment, the Senate report said at p. 3324:

> To redefine the term "public work" so as to clarify its meaning and make it construe consistently with Federal court decisions. It was the intention of Congress that this term would cover both fixed and movable projects including service projects. Some State court decisions have disregarded this congressional intent, presumably because the purpose is not explicitly spelled out in the act, and have imposed further State liability upon employers in a manner inconsistent with the underlying purposes of the act. By redefining the term "work work" to include the words "whether or not fixed," the original intention to have it apply to projects of all kinds otherwise within the definition, including service contract projects, is reaffirmed.

After the amendment, as before, no case has set aside a Defense Base Act compensation award to a member of a crew of an aircraft performing overseas flights pursuant to a public work service contract. Since the amendment the contention has been twice rejected; the last time by the court below (R. 36-37; App. 28, 30), previously by Judge Beeks in Alaska Air Lines v. O'Leary, 216 F. Supp. 540-543 (W.D. Wash. 1964), vacated 336 F. 2d 668 (9th Cir. 1965).

2. The deceased aircraft pilot was not "a master or member of the crew of any vessel" within the exception from coverage contained in 42 U.S.C. 1654(3) and 33 U.S.C. 903(a)(1). Before the deputy commissioner the question of the "vessel" status of

the Constellation aircraft, a non-amphibious and indeed non-floatable airplane, was not raised by appellants (Tr. 8-11). Accordingly, no evidence on the question was offered and under established principles of review the issue is not open for appellants in this Court.[6/]

If the issue is to be considered, this Court, presumably, can notice judicially that a Constellation is not a Flying Boat, such as Judge Cardozo had for consideration in Reinhart v. Newport Flying Service Corp., 232 N. Y. 115, 133 N.E. 371 (1921), relied on by appellants. Whatever may be said of a Flying Boat, a Constellation is not a structure capable of being, or intended to be used, as a means of transportation "on water," cf. 1 U.S.C. 3; 46 U.S.C. 801.

Appellants' contention that claimants' proper remedy is maritime, as dependents of a vessel crew member, excluded from compensation is novel. From its original enactment in 1941, the Defense Base Act has contained an exception in 42 U.S.C. 1654 for injuries or deaths of employees under the Federal Employees' Compensation Act, 5 U.S.C. 751 et seq., or engaged in agriculture, domestic or casual employment and "(3) a master or member of a crew of any vessel." This exception corresponds

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6/ "If the point now raised had been urged at the hearing, abundant evidence would have been forthcoming." Metropolitan Cas. Ins. Co. v. Hoage, 89 F. 2d 798, 800 (D. C. Cir. 1937); Maryland Cas. Co. v. Cardillo, 107 F. 2d 959, 961 (D.C. Cir. 1939). This is a corollary of the rule that review is on the basis of the evidence before the administrative authority not by other evidence not produced. United States v. Carlo Bianchi & Co., 373 U.S. 709, 714-715 (1963).

to 33 U.S.C. 903(a)(1) in identical language. Down to the time of the 1958 amendments it had not been urged that the exceptions related to aircraft crew members.

The 1941 Congressional reports contained no explanation. They merely state that an exception of vessel crew members has been made.7/ There was no need of explanation, since Warner v. Goltra, 293 U.S. 155, 159-160 (1934), and South Chicago v. Bassett, 309 U.S. 251, 256-261 (1940), had recited the legislative history and purpose of that language to exclude from federal compensation coverage all masters and members of crews of any vessels, since their representatives, unlike those of the longshoremen and ship repairmen, insisted that they wished to retain their maritime remedies by suit for maintenance, unseaworthiness and damages under the Merchant Marine (Jones) Act, 46 U.S.C. 688.

The contention that aircraft crew members are members of the "crew of any vessel" appears to have been urged in only two cases prior to the present. In Stickrod v. Pan American Airways Co., 1941 U.S. Av. R. 69, 1 CCH Avi. Cas. 942 (S.D.N.Y. 1941), not otherwise reported, the dependents of a flight engineer of a Sikorsky Flying Boat, lost over the Pacific, brought a Jones Act suit against his employer. The court dismissed the complaint on defendants' motion, on the ground that a flying boat is not a vessel; no appeal was taken. In the

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7/ H. Rep. No. 1070, S. Rep. No. 540, 77th Cong., 1st Sess.

next case, Alaska Airlines v. O'Leary, 216 F. Supp. 540 (W.D. Wash 1963), vacated 336 F. 2d 668 (9th Cir. 1965), Judge Beeks did not reach the point since he held an injury within the United States was in any event not intended to be covered by the Defense Base Act.

The court below, citing the Warner and South Chicago cases, but not Stickrod, reached the same result and held Mr. Thomas not to be excluded from Defense Base Act coverage (R. 49, App. 31).

Supporting the decisions in Stickrod and the court below are many similar cases holding that an aircraft is not a vessel for purposes of shipowners' limitation of liability;[8/] nor for the purpose of in rem liability for repairs;[9/] nor for the purpose of punishing over-water offenses on aircraft flight.[10/] The British cases are in accord.[11/]

8/ Dollins v. Pan American Grace Airways, 27 F. Supp. 487 (S.D.N.Y. 1939); Noakes v. Imperial Airways, 29 F. Supp. 412 (S.D.N.Y. 1939), 46 U.S.C. 183 et seq.

9/ United States v. Northwest Air Service, 80 F. 2d 804, 805 (9th Cir. 1935); and Foss v. The Crawford Bros. No. 2, 215 Fed. 269 (W.D. Wash. 1914).

10/ United States v. Peoples, 50 F. Supp. 462, 463 (N.D. Calif. 1943); United States v. Cordova, 89 F. Supp. 298 301-302 (E.D.N.Y. 1950).

11/ Watson v. R.C.A. Victor Co., 1935 A.M.C. 1251, 50 Lloyd's L.R. 77; Polpen Shipping Co. v. Commercial Union, 1943 A.M.C. 438, 74 Lloyd's L.R. 157 (K. B. Div.)

Appellants' citation of cases, holding aircraft to be subject to salvage liens and their crews or passengers on flights over and above the ocean to be subject to the Death on the High Seas Act, are in no wise inconsistent. As the court pointed out in the Warner and South Chicago cases, our concern here is with the meaning of the expression "crew of any vessel" as used in this particular statute having "appropriate regard to its distinctive aim."

In sum, the deceased employee was covered by the Defense Base Act. As conclusively shown by the preceding discussion and by the facts outlined above in our Statement, there was abundant evidence to support the Deputy Commissioner's finding that the employee was engaged in the performance of a service contract for public work. It is also clear that he was not excepted as a member of the crew of any vessel. Thus, the right of his dependents to receive an award of death benefits under the Act is equally clear.

II. Claimants' acceptance of the state compensation award was not an election to waive or release their federal rights.

While appellants assert that claimants' rights to benefits under the Longshoremen's Act are barred by res judicata, estoppel or election, their complaint expressly admits that there was no actual adjudication of that issue by the state tribunal. The complaint alleges (Para. XIII, R. 03-04):

> No express issue of jurisdiction was raised in the proceedings before the California Industrial

> Accident Commission, but it will be conceded that the power to make an award of benefits was lacking unless the Commission possessed the necessary jurisdiction to take such action.

Appellants thus admit that their contention that claimants have waived or released their federal rights contrary to the prohibition which Congress wrote in 33 U.S.C. 908(i), 915(b) and 916, is founded entirely on implication.

This is confirmed by the state compensation order itself which contains no finding whatsoever concerning jurisdiction (Tr. 208-210, supra, p. 4). It does not even find that the contract of employment was entered into in California and the injury occurred outside the state over the high seas so as to bring it within California Labor Code § 5305.[12/]

1. No case involving any federal compensation act has ever held that acceptance of a state award works an estoppel by judgment or binding election of remedies barring claimants' federal rights. Every decided federal case is to the contrary. Recently, a host of state cases have similarly upheld second awards for the difference in benefits under two state acts in cases falling within the shoreside twilight zone of overlapping state remedies between the state of the employment relation and the state of the place of injury.

The Supreme Court in Calbeck v. Travelers Ins. Co., 370 U.S. 114, 131-132 (1962), cited with approval decisions of this

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12/ See King v. Pan American World Airways, 270 F. 2d 355 (9th Cir. 1959), cert. den. 362 U.S. 928.

and other courts declaring an adjudicated state award did not bar a federal remedy. Thus in Western Boat Bldg. Co. v. O'Leary, 198 F. 2d 409, 411 (9th Cir. 1952) this Court said:

> Appellants contend that the Washington Workmen's Compensation Act provided the exclusive remedy to Markovich [the injured employee]. This argument necessarily implies that payment of compensation under state law ousts the federal jurisdiction. With such a statement we cannot agree * * *. Even if it is assumed arguendo, however, that the Washington Commission had adjudicated and granted the award under the state act, we do not regard such action as constituting a bar to claimant's rights under federal law.

Earlier, in Newport News S.B. & D.D. Co. v. O'Hearne, 192 F. 2d 968, 969-970, 971 (4th Cir. 1951), the Court concluded:

> It is true that the Virginia Commission accepted jurisdiction in this instance and awarded compensation, and that the courts have been inclined in doubtful cases to uphold awards by state as well as by federal administrative authority; * * * There is of course no merit in the point that the widow, having first made application to the state body, is bound by her election even though, as it now appears, the state commission had no jurisdiction in the premises. Justice is done by the requirement of the District Court that the sums heretofore paid for compensation under the award of the state compensation shall be credited upon the award of the Deputy Commissioner.

We believe these cases are controlling here.[13/]

13/ Accord: Globe Indemnity Co. v. Calbeck, 230 F. Supp. 9, 11-13, 17 (S.D. Tex. 1959); United States F & G Co. v. Lawson, 15 F. Supp. 116, 119 (S.D. Ga. 1936), payments under finally adjudicated state awards; Great Lakes D. & D. Co. v. Brown, 47 F. 2d 265 (N.D. Ill. 1930), payments under finally adjudicated state award continued by agreement. See also Massachusetts Bonding & Ins. Co. v. Lawson, 149 F. 2d 853, 854 (5th Cir. 1945) and Holland v. Harrison Bros., 306 F. 2d 369, 373 (5th Cir. 1962), payments of settlement under state acts.

Since Industrial Commission v. McCartin, 330 U.S. 622, 628 (1947), limiting the Court's prior decision in Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943), it has been settled that a compensation award or judgment in one jurisdiction gives the employer and insurer only a credit for the amounts received by the beneficiaries. Cramer v. State Concrete Corp., 39 N.J. 507, 189 Atl. 2d 213, 214, 215-216 (1963), in holding that acceptance of the award did not operate as a waiver or release, the New Jersey court said:

> The question is not whether an employee should be permitted to bring multiple suits to enforce the same right, but whether his pursuit of a right under the laws of one state should bar the pursuit of a distinct right under the laws of another state. As a matter of fairness the employee should receive "the highest available amount of compensation" to which he is entitled, so long, of course, as credit is given for payments received. * * * It would be unjust to charge a workman with an "election" or "estoppel" because of an uninformed choice. Moreover, our State has a special interest in the enforcement of its own compensation plan, so much so that the parties cannot bargain away any part of the employee's scheduled benefits. * * * In short the payment of anything less than the employee's full due is repugnant to the policy of our law.

Accord: Industrial Indemnity Exch. v. I. A. C., 80 Cal. App. 2d 480, 182 Pac. 2d 309, 312 (1947).[14/]

14/ See also Cline v. Byrne Doors, 324 Mich. 540, 37 N.W. 2d 630, 633-634, 636 (1949); Yoshi Ogino v. Black, 278 App. Div. 146, 104 N.Y.S. 2d 82, 86 (1951), aff'd 304 N.Y. 872, 109 N.E. 2d 884; Lavoie's Case, 334 Mass. 403, 135 N.E. 2d 750, 751, 754 (1956); Martin v. L & A Contracting Co., 249 Miss. 441, 162 So. 2d 870, 872 (1964); Groendyke v. Gardner, --- Okla. ---, 353 Pac. 2d 695, 699 (1960); Sorenson v. Standard Const. Co., 238 Minn. 68, 55 N.W. 2d 630, 631 (1952); Spiez v. Ind. Com., 251 Wis. 168, 28 N.W. 2d 354, 355, 359 (1947).

2. In view of 42 U.S.C. 1651(c) making the Defense Base Act exclusive of state compensation acts, there can be no implication of res judicata, estoppel by judgment, or election barring claimants' federal rights. The California Commission had no authority to decide the question of claimants' federal rights but in any case its order made no finding concerning claimants' federal rights. Since the two claims are under different statutes and the two causes of action are not the same, there can be no res judicata.[15/] Nor can be estoppel by judgment here where the first tribunal has not adjudicated claimants' rights to the California remedy as exclusive of their federal rights. Estoppel by judgment does not apply unless the record of the first tribunal clearly shows it made a considered decision of the precise issue on the basis of the evidence.[16/]

So far as the record here indicates, claimants' federal rights were a defense available to appellants before the

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15/ See Dixie S. & G. Co. v. Holland, 255 F. 2d 304, 310 (5th Cir. 1958); Peckham v. Family Loan Co., 196 F. 2d 838, 841 (5th Cir. 1952); Parkinson v. California Co., 233 F. 2d 432, 437-438 (10th Cir. 1956); Davis v. St. Paul-Mercury Indemnity Co., 294 F. 2d 641, 643 (4th Cir. 1961); Parker v. Sager, 174 F. 2d 657, 661 (D.C. Cir. 1949); Restatement of Judgments, § 68.

16/ Hoffman v. New York, N.H. & Hartford R.R. Co., 74 F. 2d 227, 230 (2d Cir. 1934), cert. den. 294 U.S. 715; Bretsky v. Lehigh Valley R.R. Co., 156 F. 2d 594, 596 (2d Cir. 1946); Guidry v. Ocean Drilling Co., 244 F. Supp. 691, 692 (E.D. La. 1965); Smith v. Service Contracting Co., 236 F. Supp. 492, 495 (E.D. La. 1964); Zimmerman v. Scandrett, 57 F. Supp. 799, 805 (E.D. Wis. 1944). See Mike Hooks v. Pena, 313 F. 2d 696, 700 (5th Cir. 1963).

California tribunal which was not passed upon because Appellants waived by failing to assert it. Certainly the record shows no election by Claimants in the proceedings before the California tribunal to waive or release their federal rights. Indeed, any attempt to do so would be invalid.[17/]

In sum, as the court below has correctly held, nothing about the California state proceedings has barred the claimants' rights to this present award of Defense Base Act benefits.

CONCLUSION

For the foregoing reasons we believe that the decision below was clearly correct and should be in all respects affirmed.

Respectfully submitted,

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17/ Such waiver would necessarily be expressly contrary to 42 U.S.C. 1651(c) and 33 U.S.C. 908(i), 915(b) and 916. To apply the rule of res judicata or election not only violates the statutory prohibition against waiver or release, but permits the very overreaching by insurance carriers that prohibition was designed to prevent. Hororitz, Workmen's Compensation (1944), p. 41; See 56 Yale L. J. 562, 568 (1947), for examples.

CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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